

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

F-STAR PROPERTY MANAGEMENT, INC.'S RESPONSE IN OPPOSITION TO
CONTINENTAL CASUALTY COMPANY'S MOTION TO STRIKE NON-RETAINED
EXPERT WITNESS DESIGNATIONS

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STATEMENT OF ISSUES

1. Whether F-Star's timely filed non-retained expert witness designations are sufficient to comply with F. R. Civ. P. 26(a)(2)(C).
2. If F-Star's non-retained expert witness designations are insufficient, whether F-Star should be allowed to supplement them, rather than suffer the harsh sanction of altogether striking them.

Defendant and Counterclaimant F-Star Property Management, Inc. (“F-Star”) responds to the motion by Plaintiff and Counter-Defendant Continental Casualty Company (“CNA”) seeking to strike F-Star’s non-retained expert designations and says:

F-STAR’S EVIDENCE IN SUPPORT OF RESPONSE

1. In support of this response, F-Star relies upon:
 - a. F-Star’s designation of testifying experts with respect to claims for affirmative relief, dated March 8, 2011 [Dkt. #18];
 - b. F-Star’s supplemental designation of testifying experts, dated April 20, 2011 [Dkt. #32]; and
 - c. CNA’s notices to depose F-Star’s non-retained experts Rick Armendariz, Tim McAuley, Rick Given and Henry Ng¹.

CNA’S MOTION SHOULD BE DENIED

2. Discovery is scheduled to close in this case on May 27, 2011.
3. On April 19 and 20, 2011, by agreement, without subpoena served upon the witnesses and pursuant to the notices attached as Exhibit “1”, CNA took the videotaped oral depositions of F-Star’s non-retained experts Rick Armendariz, Tim McAuley, Rick Given and Henry Ng. Additional documents responsive to such notices and in the possession of the deponents were produced by F-Star prior to the depositions of Rick Armendariz, Tim McAuley and Rick Given, and CNA’s counsel took full depositions of all four (4) witnesses, unimpeded by a single objection from F-Star’s counsel and unhampered in the scope of questions which CNA’s counsel chose to ask. During those depositions, none of those witnesses attempted to extend the scope of their testimony beyond the information provided in their designations.

¹ Copies of these notices are attached to this response collectively as Exhibit “1”.

4. The depositions of F-Star's other non-retained expert witnesses, which have been requested by CNA to date, have been scheduled by agreement between counsel for the parties. Those depositions are scheduled for dates during the weeks of May 2, 2011 and May 9, 2011, in Phoenix, Arizona and in El Paso, Texas. F-Star anticipates that CNA's counsel will once more take full depositions of those witnesses, and that none of those witnesses will attempt to extend the scope of their testimony beyond the information provided in their designations. To the extent that those witnesses have additional documents responsive to any notices for their depositions that CNA may serve, F-Star will endeavor to obtain and produce those documents in advance of those depositions, too, just as it did with the ones already taken.

5. Without citing a single authority in support of its argument, without seeking any prior relief or ruling from this Court on the issue of sufficiency of F-Star's non-retained expert witness designations, and without alleging or showing any harm or prejudice it has suffered as a result of such alleged deficiencies, CNA seeks to altogether strike F-Star's non-retained expert witness designations. By doing so, CNA seeks to leave F-Star unable to defend the claims asserted against it by CNA, which are an unprecedented², pre-emptive effort to defeat F-Star's rights to recover under its policy of insurance.

² See Exhibits 1 and 2 to F-Star's response in opposition to CNA's motion for partial summary on time element losses. [Dkt. #30-1].

6. F-Star has made a good faith effort to comply with the rules requiring the designation of non-retained experts, which are less rigid than the rules for retained experts, and deservedly so. F-Star does not have control over these witnesses, and is limited in some instances by the amount of information and documents it can obtain from these witnesses³. As shown by their reports, none of them had any agreement with F-Star to be compensated for giving their opinions.⁴

7. F-Star believes that its non-retained expert designations comply with the rules, and F-Star has not made any effort to conceal any information from CNA in such designations, or to delay or interfere with CNA's efforts to depose those witnesses. To the extent that the Court finds that such designations are in any manner deficient, instead of summarily striking those designations in this suit filed against F-Star by its own insurer, F-Star requests leave of this Court for the opportunity to promptly cure whatever deficiencies the Court may determine to exist.

³ As an example, the videotaped oral deposition of F-Star non-retained expert Martin Elmquist was scheduled to be taken by CNA by agreement and notice on April 20, 2011. Mr. Elmquist had provided a written report of his opinions, dated March 8, 2011, which had been disclosed to CNA's counsel. The morning of that deposition, Mr. Elmquist's employer called F-Star's counsel and refused to allow Mr. Elmquist to be produced for deposition, contending that he had not been properly served with a subpoena by CNA compelling the witness to appear. F-Star's counsel had agreed to produce such witness voluntarily, and the witness himself had agreed to appear without a subpoena.

⁴ At his April 20, 2011 deposition, Henry Ng testified that he intended to charge F-Star for his time in giving his deposition, but admitted that he had no agreement with F-Star allowing him to do so.

REQUEST FOR RELIEF

For the reasons set forth in this response, F-Star asks that this Court deny CNA's motion in its entirety.

Dated: April 21, 2011.

Randy Lee
Attorney at Law
3300 North A Street, Building 2-104
Midland, TX 79705
Telephone: (432) 638-0895
Fax: (432) 224-1044

_____/s/_____
Randy Lee
Texas Bar No. 12074600
Attorney for F-Star Property Management, Inc.

CERTIFICATE OF SERVICE

I certify that April 21, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to Todd M. Tippett, attorney for CNA, at Zelle, Hofmann, Voelbel & Mason, L.L.P., 901 Main Street, Suite 400, Dallas, TX 75202-3975.

_____/s/_____
Randy Lee

EXHIBIT “1”

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CONTINENTAL CASUALTY §
COMPANY, §
§
Plaintiff, §
§
v. § CIVIL ACTION NO. EP-10-CV-00102-KC
§
F-STAR PROPERTY MANAGEMENT, §
INC., §
§
Defendant. §

**NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF
RICK ARMENDARIZ AND SUBPOENA DUCES TECUM**

TO: Defendant, F-Star Property Management, Inc., by and through its attorney of record, Randy Lee, ATTORNEY AT LAW, 3300 North A Street, Building 2-104, Midland, Texas 79705-5545.

Please take notice that, pursuant to Rule 30(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE, Plaintiff Continental Casualty Company will take the oral deposition of **RICK ARMENDARIZ**. The deposition will be recorded by stenographic means, before a notary public or another officer authorized by law to administer oaths, commencing at **9:00 a.m. on Tuesday, April 19, 2011**, at the offices of RASBERRY & ASSOCIATES, 300 East Main Street, Suite 1024, El Paso, Texas 79901, Telephone: 800-526-5913. The deposition will continue from day-to-day until completed and will be videotaped.

SUBPOENA DUCES TECUM

Rick Armendariz is hereby commanded to bring the following documents to the above-noticed deposition:

1. All documents Mr. Armendariz relied on in forming the opinions contained in his report and/or opinions upon which he will testify at trial.

2. All documents that contain or reflect correspondence between any F-Star representative and Mr. Armendariz regarding the subject matter of this litigation and/or his testimony.
3. All documents that contain or reflect correspondence between Jerry Ayoub and Mr. Armendariz regarding the subject matter of this litigation and/or Mr. Armendariz's testimony.
4. All documents that contain or reflect correspondence between Randy Lee and Mr. Armendariz regarding the subject matter of this litigation and/or Mr. Armendariz's testimony.

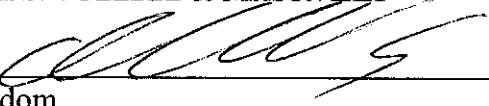
You are subpoenaed to appear by the following attorneys and unless excused from this subpoena by these attorneys or the Court, you shall respond to this subpoena as directed. If you fail to appear, you may be in contempt of Court.

All counsel of record are invited to attend and to conduct cross-examination of the Deponent if they so desire.

Dated: April 12, 2011.

Respectfully submitted,

ZELLE HOFMANN VOELBEL & MASON LLP

By: 

G. Brian Odom
Texas Bar No. 50511840
Todd M. Tippett
Texas Bar No. 24046977
David B. Winter
Texas Bar No. 24037731

901 Main Street, Suite 4000
Dallas, Texas 75202-3975
Telephone: 214-742-3000
Facsimile: 214-760-8994

**ATTORNEYS FOR PLAINTIFF
CONTINENTAL CASUALTY COMPANY**

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing has been served on April 12, 2011, to the following counsel of record as follows:

Randy Lee
ATTORNEY AT LAW
3300 North A Street, Building 2-104
Midland, TX 79705-5545
Telephone: 432-638-0895
Facsimile: 432-224-1044
**Attorney for Defendant F-Star
Property Management, Inc.**



David B. Winter

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CONTINENTAL CASUALTY COMPANY, §
Plaintiff, §
v. § CIVIL ACTION NO. EP-10-CV-00102-KC
F-STAR PROPERTY MANAGEMENT, INC., §
Defendant. §

**NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF
TIM MCAULEY AND SUBPOENA DUCES TECUM**

TO: Defendant, F-Star Property Management, Inc., by and through its attorney of record, Randy Lee, ATTORNEY AT LAW, 3300 North A Street, Building 2-104, Midland, Texas 79705-5545.

Please take notice that, pursuant to Rule 30(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE, Plaintiff Continental Casualty Company will take the oral deposition of **TIM MCAULEY**. The deposition will be recorded by stenographic means, before a notary public or another officer authorized by law to administer oaths, commencing at **1:00 p.m. on Tuesday, April 19, 2011**, at the offices of RASBERRY & ASSOCIATES, 300 East Main Street, Suite 1024, El Paso, Texas 79901, Telephone: 800-526-5913. The deposition will continue from day-to-day until completed and will be videotaped.

SUBPOENA DUCES TECUM

Tim McAuley is hereby commanded to bring the following documents to the above-noticed deposition:

1. All documents Mr. McAuley relied on in forming the opinions contained in his report and/or opinions upon which he will testify at trial.

2. All documents that contain or reflect correspondence between any F-Star representative and Mr. McAuley regarding the subject matter of this litigation and/or his testimony.
3. All documents that contain or reflect correspondence between Jerry Ayoub and Mr. McAuley regarding the subject matter of this litigation and/or Mr. McAuley's testimony.
4. All documents that contain or reflect correspondence between Randy Lee and Mr. McAuley regarding the subject matter of this litigation and/or Mr. McAuley's testimony.

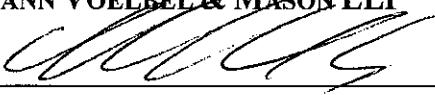
You are subpoenaed to appear by the following attorneys and unless excused from this subpoena by these attorneys or the Court, you shall respond to this subpoena as directed. If you fail to appear, you may be in contempt of Court.

All counsel of record are invited to attend and to conduct cross-examination of the Deponent if they so desire.

Dated: April 12, 2011.

Respectfully submitted,

ZELLE HOFMANN VOELBEL & MASON LLP

By: 

G. Brian Odom
Texas Bar No. 50511840
Todd M. Tippett
Texas Bar No. 24046977
David B. Winter
Texas Bar No. 24037731

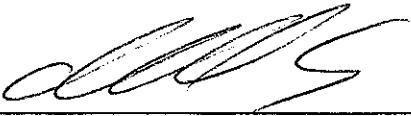
901 Main Street, Suite 4000
Dallas, Texas 75202-3975
Telephone: 214-742-3000
Facsimile: 214-760-8994

**ATTORNEYS FOR PLAINTIFF
CONTINENTAL CASUALTY COMPANY**

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing has been served on April 12, 2011, to the following counsel of record as follows:

Randy Lee
ATTORNEY AT LAW
3300 North A Street, Building 2-104
Midland, TX 79705-5545
Telephone: 432-638-0895
Facsimile: 432-224-1044
**Attorney for Defendant F-Star
Property Management, Inc.**



David B. Winter

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CONTINENTAL CASUALTY COMPANY, §
Plaintiff, §
v. § CIVIL ACTION NO. EP-10-CV-00102-KC
F-STAR PROPERTY MANAGEMENT, INC., §
Defendant. §

**NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF
RICK GIVEN AND SUBPOENA DUCES TECUM**

TO: Defendant, F-Star Property Management, Inc., by and through its attorney of record, Randy Lee, ATTORNEY AT LAW, 3300 North A Street, Building 2-104, Midland, Texas 79705-5545.

Please take notice that, pursuant to Rule 30(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE, Plaintiff Continental Casualty Company will take the oral deposition of **RICK GIVEN**. The deposition will be recorded by stenographic means, before a notary public or another officer authorized by law to administer oaths, commencing at **3:00 p.m., or as soon as possible thereafter after the conclusion of Tim McAuley's 1:00 p.m. deposition, on Tuesday, April 19, 2011**, at the offices of RASBERRY & ASSOCIATES, 300 East Main Street, Suite 1024, El Paso, Texas 79901, Telephone: 800-526-5913. The deposition will continue from day-to-day until completed and will be videotaped.

SUBPOENA DUCES TECUM

Rick Given is hereby commanded to bring the following documents to the above-noticed deposition:

1. All documents Mr. Given relied on in forming the opinions contained in his report and/or opinions upon which he will testify at trial.

2. All documents that contain or reflect correspondence between any F-Star representative and Mr. Given regarding the subject matter of this litigation and/or his testimony.
3. All documents that contain or reflect correspondence between Jerry Ayoub and Mr. Given regarding the subject matter of this litigation and/or Mr. Given's testimony.
4. All documents that contain or reflect correspondence between Randy Lee and Mr. Given regarding the subject matter of this litigation and/or Mr. Given's testimony.

You are subpoenaed to appear by the following attorneys and unless excused from this subpoena by these attorneys or the Court, you shall respond to this subpoena as directed. If you fail to appear, you may be in contempt of Court.

All counsel of record are invited to attend and to conduct cross-examination of the Deponent if they so desire.

Dated: April 12, 2011.

Respectfully submitted,

ZELLE HOFMANN VOELBEL & MASON LLP

By: 

G. Brian Odom
Texas Bar No. 50511840
Todd M. Tippett
Texas Bar No. 24046977
David B. Winter
Texas Bar No. 24037731

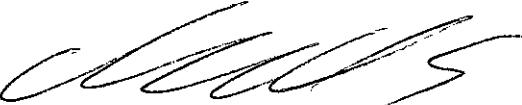
901 Main Street, Suite 4000
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**ATTORNEYS FOR PLAINTIFF
CONTINENTAL CASUALTY COMPANY**

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3300 North A Street, Building 2-104
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Telephone: 432-638-0895
Facsimile: 432-224-1044
**Attorney for Defendant F-Star
Property Management, Inc.**



David B. Winter

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CONTINENTAL CASUALTY
COMPANY,

Plaintiff,

v.

F-STAR PROPERTY MANAGEMENT,
INC.,

Defendant.

CIVIL ACTION NO. EP-10-CV-00102-KC

**NOTICE OF INTENTION TO TAKE ORAL AND VIDEOTAPED DEPOSITION OF
HENRY NG AND SUBPOENA DUCES TECUM**

TO: Defendant, F-Star Property Management, Inc., by and through its attorney of record, Randy Lee, ATTORNEY AT LAW, 3300 North A Street, Building 2-104, Midland, Texas 79705-5545.

Please take notice that, pursuant to Rule 30(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE, Plaintiff Continental Casualty Company will take the oral deposition of **HENRY NG**. The deposition will be recorded by stenographic means, before a notary public or another officer authorized by law to administer oaths, commencing at **9:00 a.m. on Wednesday, April 20, 2011**, at the offices of RASBERRY & ASSOCIATES, 300 East Main Street, Suite 1024, El Paso, Texas 79901, Telephone: 800-526-5913. The deposition will continue from day-to-day until completed and will be videotaped.

SUBPOENA DUCES TECUM

Henry Ng is hereby commanded to bring the following documents to the above-noticed deposition:

1. All documents Mr. Ng relied on in forming the opinions contained in his report and/or opinions upon which he will testify at trial.

2. All documents that contain or reflect correspondence between any F-Star representative and Mr. Ng regarding the subject matter of this litigation and/or his testimony.
3. All documents that contain or reflect correspondence between Jerry Ayoub and Mr. Ng regarding the subject matter of this litigation and/or Mr. Ng's testimony.
4. All documents that contain or reflect correspondence between Randy Lee and Mr. Ng regarding the subject matter of this litigation and/or Mr. Ng's testimony.

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Dated: April 12, 2011.

Respectfully submitted,

ZELLE HOFMANN VOELBEL & MASON LLP

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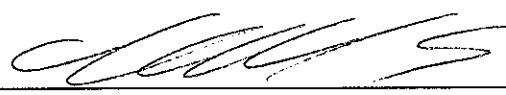
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**Attorney for Defendant F-Star
Property Management, Inc.**



David B. Winter